

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREEMAN EUGENE FRANKS,

Defendant-Appellant.

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UNPUBLISHED

August 17, 2001

No. 222118

St. Clair Circuit Court

LC No. 99-000222-FH

Before: Gage, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant was convicted of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v). At the sentencing hearing, defense counsel objected to the accuracy of a prior felony conviction noted on the presentence investigation report (PSIR). The trial court neither made a finding with respect to the report's accuracy, nor determined such a finding unnecessary because it did not intend to consider the challenged information in imposing sentence. The trial court sentenced defendant to an enhanced term of sixty-four to ninety-six months' imprisonment on the bases of (i) defendant's prior possession of a controlled substance conviction, MCL 333.7413(2), and (ii) his status as a third habitual offender, MCL 769.11. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred in failing to either make a finding with respect to the accuracy of the PSIR, or to determine such a finding unnecessary on the basis that the inaccuracy was irrelevant to the court's imposition of sentence. This Court reviews for an abuse of discretion a trial court's sentencing of habitual offenders. *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000). Even when this Court finds an abuse of discretion, however, it will not order reversal of harmless errors. *People v Harrison*, 119 Mich App 491, 496-497; 326 NW2d 827 (1982).

Criminal defendants have the right to be sentenced on the basis of accurate information. *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000). A trial court has a duty to respond to the defendant's objections that the PSIR contains inaccurate information. *Id.* In response to a defendant's objection to sentencing information, the court may either hold an evidentiary hearing to establish the veracity of the information in the PSIR, accept defendant's version of the relevant facts, or determine that the disputed information is not relevant to the sentencing decision. *People v Pierce*, 158 Mich App 113, 117; 404 NW2d 230 (1987). The

court's failure to respond may be considered harmless error, however, when the alleged inaccuracies would have no determinative effect on the defendant's sentence. *McAllister, supra*. "[R]esentencing is not mandated . . . where the error was harmless beyond a reasonable doubt because the inaccuracy would have no bearing on the ultimate sentence." *Harrison, supra* at 497.

The instant record reflects that defendant challenged at the sentencing hearing the PSIR's inaccurate statement that he had three prior felony convictions, but that the trial court failed to explicitly address defendant's challenge. The trial court's failure to address defendant's challenge constituted an abuse of discretion. *Pierce, supra* at 116-117.

Nonetheless, we decline to disturb the sentence because the error was harmless. Even where error exists, a defendant has the burden of showing, more probably than not, that a miscarriage of justice occurred. MCL 769.26; *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999). Defendant did not carry this burden.

Defendant's conviction of possession of less than twenty-five grams of cocaine carried a four-year maximum term of imprisonment. MCL 333.7403(2)(a)(v). According to MCL 333.7413(2), the trial court had the authority to sentence defendant, a prior drug offender, to double this term for a maximum sentence equaling eight years' imprisonment. Irrespective of the Illinois conviction that defendant contested, defendant's PSIR showed two prior felony convictions, one of which constituted a controlled substance violation. Defendant did not dispute this prior felony drug conviction. The trial transcript reflects that after the jury rendered its verdict and was dismissed, the trial court inquired of defendant regarding his prior convictions. Defendant then acknowledged to the court that in September 1988 he indeed had been convicted of a felony drug possession charge. The undisputed existence of defendant's earlier felony drug conviction, in combination with his present conviction, fully supports the sentence imposed by the trial court. The existence of the disputed Illinois controlled substance delivery conviction would not have affected the sentencing. See MCL 333.7413(2) (providing for a doubling of applicable penalties when "an individual [has been] convicted of a *second or subsequent* offense") (emphasis added).<sup>1</sup>

The sentence imposed by the trial court, sixty-four to ninety-six months, thus fell within the statutorily authorized maximum term. A sentence within the statutory limits is not, standing alone, evidence of a miscarriage of justice. *People v Avant*, 235 Mich App 499, 521; 597 NW2d 864 (1999). Furthermore, the trial court properly ordered a minimum sentence of no more than two-thirds the maximum term. *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972). The trial court correctly set the sentence between sixty-four and ninety-six months, which result

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<sup>1</sup> We also note that irrespective of the challenged Illinois conviction, the record supports the trial court's enhancement of defendant's sentence on the basis of his third habitual offender status. MCL 769.11. As mentioned above, after the jury's discharge the trial court questioned defendant regarding his prior convictions. In addition to defendant's acknowledgement of his 1988 possession of a controlled substance conviction, defendant admitted that he possessed a February 1995 conviction of assault with a dangerous weapon. Accordingly, defendant's third habitual offender status was established undisputedly regardless of the challenged Illinois conviction.

would have pertained given the existence of one prior drug conviction, or two. Because the undisputed record supported the trial court's sentence within the legislatively prescribed limits, we find harmless any error that occurred during the trial court's imposition of sentence.

Defendant next argues that the trial court erred because the sentence it imposed exceeded the sentences that would have applied under the Supreme Court's sentencing guidelines and the new legislative guidelines. We are not persuaded by this claim, however, because neither set of guidelines applies in this case. The new legislative guidelines plainly do not apply to offenses committed before January 1, 1999. MCL 769.34(1), (2); *Reynolds, supra* at 253-254. Although the Supreme Court's sentencing guidelines generally apply to offenses committed before January 1, 1999, they do not apply to habitual offender convictions. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Furthermore, a specific statutory provision governs the calculation of sentences for repeat drug offenders. MCL 333.7413(2); *People v Williams*, 205 Mich App 229, 231; 517 NW2d 315 (1994).

To the extent that defendant questions the proportionality of his sentence, even without considering the Illinois conviction that defendant challenged we find ample evidence demonstrating that the sixty-four to ninety-six-month term was proportionate to the circumstances surrounding the instant crime and defendant's criminal history. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). Defendant's instant conviction constituted his third felony conviction, and defendant had three prior misdemeanor convictions. As the trial court noted, defendant had a further, extensive history of prior arrests and charges. The trial court's additional findings that defendant exhibited no inclination to rehabilitate himself and posed a danger to the community were supported by evidence that (i) several of defendant's convictions and many of his other arrests involved assaultive crimes, (ii) defendant did not establish a history of stable employment, and (iii) defendant acknowledged an eighteen-year addiction to alcohol and various controlled substances, and that he did not benefit from several prior rehabilitation programs. The PSIR further noted that defendant blamed his addiction and police harassment for his ongoing misfortunes. We cannot conclude that the trial court abused its discretion in imposing defendant's sentence.

Defendant lastly asserts that the ameliorative sentencing provisions of the new legislative guidelines indicate his entitlement to resentencing. This Court in *Reynolds* clearly rejected this identical contention, and we are bound by the *Reynolds* panel's conclusion. MCR 7.215(I)(1). The *Reynolds* panel astutely set forth as follows the logic dispositive of defendant's claim:

The primary goal of statutory interpretation is to give effect to legislative intent. When statutory language is clear and unambiguous, we must honor the legislative intent as clearly indicated in that language. We presume that the Legislature intended the meaning plainly expressed in the language used in the statute.

Here, the statutory language is not ambiguous. On the contrary, the statutory language clearly states that the Legislature intended that the statutory sentencing guidelines have prospective, not retroactive, effect. MCL 769.34(1) . . . unequivocally states that the "sentencing guidelines promulgated by order of the

Michigan supreme court [i.e., the old judicially created sentence guidelines] shall not apply to felonies . . . committed on or after January 1, 1999.” Thus, the Legislature intended for the Supreme Court’s guidelines to continue to apply to felonies committed before January 1, 1999. The statute further states that the new sentencing guidelines apply to felonies “committed on or after January 1, 1999.” MCL 769.34(2) . . . . Accordingly, there is no basis for defendant’s argument that the Legislature intended the new statutory guidelines to apply to crimes committed before January 1, 1999. [*Id.* at 253-254 (citations omitted).]

Because defendant committed the instant offense in August 1998, there is no basis for this Court to apply the legislative guidelines’ ameliorative provisions to defendant’s sentence.

Affirmed.

/s/ Hilda R. Gage  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey